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Office: NEBRASKA SERVICE CENTER

Date: SEP 27 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner provides rehabilitation and orthotist services. It seeks to employ the beneficiary permanently in the United States as an orthotist and prosthetist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess a U.S. baccalaureate or foreign equivalent degree or five years of experience.

On appeal, counsel asserts that the beneficiary has the foreign equivalent of a U.S. baccalaureate and submits new employment letters documenting over five years of experience. We find that the petitioner has overcome the director's bases for denial.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

The beneficiary possesses a 1987 foreign three-year Higher National Diploma (HND) in Orthotics and Prosthetics and a 1990 Diploma in Orthotics issued by the Orthotic and Prosthetic Training and Education Council (OPTEC), awarded based on a one-year residency. Thus, the issue is whether the OPTEC diploma is a foreign equivalent degree to a U.S. baccalaureate and whether the beneficiary has an additional five years of experience.

EDUCATION

At the outset, we note that federal circuit courts have upheld our authority to evaluate whether the beneficiary is qualified for the classification sought.¹ See e.g. *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). Counsel's reliance on *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006) for the proposition that we must consider the employer's "intent" when evaluating eligibility for the classification sought is misplaced for two reasons. First, *Snapnames.com* is an unpublished decision of the District Court of Oregon and is not a precedent binding on this case. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993) (published federal

¹ But cf. *Hoosier Care, Inc. v. Chertoff*, No. 06-3562 (7th Cir. April 11, 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought.

district court cases are not binding on the BIA even on cases arising from within the same district). Second, the *Snapnames.com* court discussed the employer's intent as it relates to evaluating whether a skilled worker meets the requirements of the alien employment certification. *Id.* at *8. The court, however, then held that Citizenship and Immigration Services (CIS), when evaluating whether the alien is eligible for the classification sought, is entitled to interpret the pertinent regulatory definition of "professional" and "members of the professions holding an advanced degree" without reference to the employer's intent. *Id.* at *10 - 11.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Regl. Commr. 1977). The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). At the time of enactment of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorilland v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of existing administrative and judicial interpretations).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree*.

Employment-Based Immigrants, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."² In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. *Employment-Based Immigrants*, 56 Fed. Reg. at 60900.

In response to the director's request for additional evidence, the petitioner submitted an evaluation of the beneficiary's credentials from [REDACTED] at the Trustforte Corporation. [REDACTED]

[REDACTED] notes that under the British system, students complete 13 years of study prior to commencing undergraduate studies and that the 13th year is equivalent to one year of baccalaureate study in the United States. [REDACTED] concludes that the beneficiary's HND involved courses and credit hours equivalent to three years of study "leading to a Bachelor of Science Degree in Physical Therapy with a concentration in Orthotics, from an accredited institution of higher education in the United States." [REDACTED] then concludes that the beneficiary's OPTEC diploma "is evidence that he completed his course of bachelor's level studies" at OPTEC.

The director, relying on "information available to the public," concluded that HNDs are vocational and cannot equate to a U.S. baccalaureate.³ The director noted that "there is no provision in the statute or regulations for combining education of less than a baccalaureate degree to meet the requirements of the classification," and declined to consider the beneficiary's OPTEC diploma.

On appeal, the petitioner submits new evaluations from [REDACTED] of the Foundation for International Services, Inc. and Professor [REDACTED] of Medgar Evers College of the City University of New York (CUNY). [REDACTED] explains that the program of study at

² Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language. Thus, counsel's assertion that the prior approvals of nonimmigrant petitions in behalf of the beneficiary are indicative of prior findings that the beneficiary's OPTEC diploma is equivalent to a U.S. baccalaureate is not persuasive.

³ The record does not indicate that the director furnished the petitioner with a copy of the "information available to the public" cited in his decision and we have not relied on this information in our adjudication of the appeal.

Paddington College was “under the auspices of BTEC [the Business and Technician Education Council] and OPTEC.” The program, as a whole, is a four-year “sandwich” program that includes both academic work and training. [REDACTED] further notes that, prior to 1992, HNDs were less vocational. [REDACTED] concludes that the OPTEC diploma is “widely regarded by academics and professionals in the field of Orthotics and Prosthetics as equivalent to a bachelor’s degree in Orthotics and Prosthetics from accredited universities in the United States and the United Kingdom.” [REDACTED] then evaluates the beneficiary’s credits and reaches a similar conclusion. [REDACTED] also concludes that the beneficiary’s OPTEC diploma is equivalent to a bachelor’s degree in prosthetics and orthotics from an accredited college or university in the United States.

Finally, the petitioner submits an application for membership in the British Association of Prosthetists and Orthotists (BAPO) reflecting that membership is open to those with a British baccalaureate in the field or an OPTEC Diploma, suggesting that the OPTEC diploma is an equivalent degree.

CIS uses an evaluation by a credentials evaluation organization of a person’s foreign education as an advisory opinion only. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Commr. 1988). Where an opinion is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Id.* We have no reason to question or discount the evaluations submitted in this case. We concur with the director that the alien must have a single degree that is the foreign equivalent to a U.S. baccalaureate degree rather than multiple lesser degrees. It does not follow, however, that a postgraduate diploma that *requires* a lesser post-secondary degree for admission can never be considered a degree equivalent to a U.S. baccalaureate. The question is the equivalency of the final degree. The petitioner has provided three consistent and reasonable evaluations finding that the beneficiary’s OPTEC diploma is a foreign equivalent degree to a U.S. baccalaureate degree. These evaluations are supported by the BAPO membership requirements. Thus, we are persuaded that the beneficiary holds a foreign equivalent degree to a U.S. baccalaureate.

EXPERIENCE

The regulation at 8 C.F.R. § 204.5(g)(1) provides, in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

The priority date in this matter is January 24, 2007, the date the ETA Form 9089 was filed. See 8 C.F.R. § 204.5(d). Thus, the petitioner must establish that the beneficiary had the necessary experience as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Regl. Commr. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). On

part K of the ETA Form 9089, the beneficiary indicated that he had worked for the petitioner since December 2006. Prior to that employment, the beneficiary indicated that he worked for Eastside Orthotics Prosthetics from June 2003 to December 2006, East Coast Orthotic Prosthetic from February 2002 to October 2004 and was self-employed as an orthotist and orthotics consultant from July 1999 through February 2002.

In response to the director's request for additional evidence, the petitioner submitted a May 16, 2007 letter from [REDACTED] a professor at Columbia University College of Physicians and Surgeons, asserting that the beneficiary "has been a valuable member of our multidisciplinary team since February 2002." [REDACTED] Business Manager at Halo Healthcare, Ltd. in Liverpool, England, asserts in a letter dated November 6, 2001, that the beneficiary has had a "relationship" with Halo Healthcare "over the past six years," subsequently defined as a "freelance role." [REDACTED] elaborates that the beneficiary was placed into several clinics during this time. The petitioner also submitted three other letters from British clinics attesting to the beneficiary's services but failing to provide dates of employment.

The director concluded that the employment letters did not provide sufficient information to support a conclusion that the beneficiary had at least five years of post-baccalaureate experience. On appeal, the petitioner submits a contract with Eastside Orthotics and Prosthetics, Inc. dated April 8, 2002 and an undated employment offer from that corporation. The petitioner also submits a 2002 Form W-2, Wage and Tax Statement issued by East Coast Orthotic to the beneficiary for \$75,144.18 and a 2003 Form W-2 from the same company for \$24,673.02. In addition, the petitioner submits a new letter from [REDACTED] explaining that while the beneficiary has been directly employed by East Coast Orthotics and Prosthetics and East Side Orthotics and Prosthetics, he provides services at the Columbia University Medical Center, Morgan Stanley Children's Hospital. Thus, [REDACTED] confirms that the beneficiary has worked at that hospital since 2002.

The petitioner also submits an offer of employment as an orthotist from Halo Healthcare dated May 8, 1996 and a letter acknowledging the termination of a formal employment relationship as of June 30, 1999, to be replaced by work "on a contract basis" through December 31, 2002. As stated above, [REDACTED] wrote in 2001 confirming the beneficiary's "relationship" with Halo Healthcare over the past six years.

Finally, [REDACTED] Clinical Director at Dacey Ltd. in South Glamorgan, England, confirms the beneficiary's employment as an orthotist for Dacey from January 6, 1992 through his final day on August 30, 1996.

The petitioner has now documented that the beneficiary has more than four years of experience as an orthotist for Dacey and at least three years as a directly employed orthotist for Halo Healthcare. That employment alone is more than five years. In addition, the petitioner has submitted evidence that he has continued working as an orthotist for various employers who contracted his services to Morgan Stanley Children's Hospital.

In summary, the petitioner has established that the beneficiary is a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2) through a foreign equivalent degree to a U.S. baccalaureate plus at least five years of post-baccalaureate experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.